Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin* (*Bulletin*), which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically in the Environmental files area of the Legal Automated Army-Wide System Bulletin Board Service. The latest issue, volume 4, number 10, is reproduced in part below. The *Bulletin* is also available on the Environmental Law Division Home Page (http://160.147.194.12/eld/eldlink2.thm) for download as a text file or in Adobe Acrobat format.

EPA Addresses DOD's Concerns Over New Ozone and Particulate Matter Standards

On 17 July 1997, Environmental Protection Agency (EPA) Administrator Carol Browner sent a letter to the Department of Defense (DOD)[1] which addressed the DOD concerns raised during informal discussions with the EPA regarding the impact of the new Ozone and Particulate Matter standards on DOD training and readiness. Among other concerns raised, the DOD questioned whether the new standards would adversely affect training exercises, such as those that use obscurants.

Administrator Browner replied in her letter that, while obscurants would not be exempted under the rule, the EPA will not require states to count particulates from obscurants in its attainment demonstration. Consequently, states will not have to regulate obscurants to meet the new ozone and particulate matter standards. The EPA's policy, however, will not prevent states from regulating obscurants if they so choose. A state may regulate obscurants if they pose a health risk, since obscurants could, under the right conditions, cause an area to exceed the daily limit for particulate matter imposed by the EPA regulations. The EPA asserts that these health-based particulate matter standards protect sensitive populations.

The EPA letter also stated that military activities are among the smallest sources of fine particulates, and, in its implementation guidance, the EPA will advise states to target what the EPA feels are the primary sources for fine particulates, such as power plants and large combustion sources. Therefore, it appears, at least for the moment, that the EPA is serious about addressing the DOD's concerns about the impact the new standards will have on military training and readiness. A state could, however, choose to regulate military activities that produce fine particulates, such as dust-producing field exercises. Lieutenant Colonel Olmscheid.

Clinton Privilege Decision Provides Timely Reminder for Commanders and Managers

On 23 June 1997, the Supreme Court denied certiorari to review the Eighth Circuit's decision that lawyers in the White House counsel's office must disclose notes of their private conversations with First Lady Hillary Rodham Clinton.[2] The Eighth Circuit decision, which received considerable press coverage, reinforces the need to remind commanders and environmental program managers about attorney-client and deliberative process privileges. In light of recent stiffening by the EPA and state agencies in their enforcement policies, installation attorneys should review these issues with commanders and environmental program managers.

The Eighth Circuit's decision involved two sets of notes taken by White House attorneys which were subpoenaed by Kenneth Starr, the Whitewater independent counsel. The notes concerned Mrs. Clinton's activities following the suicide of her friend, Deputy Counsel to the President Vince Foster, and the unexplained reappearance last year of some of Mrs. Clinton's billing records from her Little Rock law firm from the 1980's; the billing records had long been sought under subpoena in the investigation.

The White House counsel argued that these conversations were protected by attorney-client privilege. The attorney-client privilege under Federal Rule of Evidence 501 "is governed by the principles of common law," and is considered to be the oldest privilege recognized by common law.[3] The position of White House counsel is intuitive for many attorneys, considering the purpose of the privilege—protection of a person's right to private, candid discussion with her lawyers. But the Eighth Circuit ruled 2-1 against the White House counsel and granted the Office of the Independent Counsel's motion to compel production of the notes.

1. The ELD's homepage (http://160.147.194.12/eld/eldlink2.htm) contains a copy of Ms. Browner's letter.

2. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), *cert denied*, Office of President v. Office of Independent Counsel, No. 96-1783, 1997 WL 274825 (June 23, 1997).

3. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

Many in the legal community view the Eighth Circuit decision with skepticism. New York University law professor Stephen Gillers opined:

> This is a very dangerous precedent and very unwise for the long term. I fear this is driven by anti-Clinton sentiment or people who just want to get to the bottom of this Whitewater business. But long after we have forgotten about Whitewater, this precedent is going to be on the books.[4]

Installation attorneys should consider discussing with their commanders two points regarding the attorney-client privilege and the Eighth Circuit decision. First, the Eighth Circuit carefully distinguished the unprivileged communications between Mrs. Clinton and White House attorneys from the privileged nature of any communications between Mrs. Clinton and her *personal* attorney, who was also present at the meetings.[5] Commanders should understand who is a judge advocate's client. In the majority of discussions between an Army commander and an Army judge advocate, the client is the Army, not the commander.[6] Commanders must understand that the type of attorney-client protection Mrs. Clinton may have had with her personal attorney would apply only to communications between an Army attorney and an individual client. This type of relationship typically exists in either a legal assistance or trial defense context.

Second, the court distinguished the White House (the Office of the President), which cannot be held criminally liable for the conduct of its employees, from a corporation (or federal agency like the DOD), which can theoretically be criminally liable. The court explained that: "corporate attorneys [whose corporations can be criminally liable] have a compelling interest in ferreting out any misconduct by its employees. The White House simply has no such interest with respect to the actions of Mrs. Clinton."[7] When an Army attorney collects materials relevant to his representation of the installation concerning possible criminal activity by the command, these documents would likely fall outside the scope of the Eighth Circuit's holding and would be deemed privileged.

Judge advocates should also remind commanders and managers about the difference between the attorney-client privilege and the deliberative process privilege under the Freedom of Information Act (FOIA). The FOIA's deliberative process privilege is unique to the government and is intended to protect open and candid communication within government agencies.[8] The privilege establishes the fifth of nine exemptions under the FOIA and exempts from release "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency."[9]

While commanders should not discourage the flow of communication through command channels concerning the installation's compliance status, they should be aware of two points which establish the somewhat narrow scope of the deliberative privilege. First, the privilege applies only to predecisional, mental, or deliberative processes, and to governmental evaluations, expressions of opinion, and recommendations on policy and decision-making matters.[10] Thus, only documents that are prepared to assist a commander in making a decision, such as decision memoranda containing fact synthesis and analysis, are privileged; purely factual materials are not privileged. Thus, final Environmental Compliance Assessment System reports are not privileged and would have to be disclosed under a proper FOIA request. Second, the deliberative privilege is "qualified," not absolute. The court must consider the following factors when applying the privilege: (1) the relevance of the evidence to be protected, (2) the availability of other evidence, (3) the seriousness of the litigation and issues involved, (4) the role of the government in the litigation, and (5) the possibility of disclosure's chilling effect on other employees.[11] By discussing these limitations with commanders, attorneys can alleviate the commanders' anxiety over whether their communications with "their lawyer" are protected from disclosure to the public. Captain Anders.

New Guidance From the Council on Environmental Quality for the National Environmental Policy Act and Transboundary Effects

On 1 July 1997, the Council on Environmental Quality (CEQ) issued guidance for agencies regarding the applicability

4. David Savage, *Privilege Ruling Disturbs Lawyers, Courts: Attorneys Fear Foundation on Which Appellate Panel Built its Ruling Against First Lady Could Have a Serious Effect on a Key Legal Tradition*, L.A. TIMES, May 18, 1997, at A11.

5. *Grand Jury Subpoena*, 112 F.3d at 917.

6. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 1.13 (1 May 1992).

7. *Grand Jury Subpoena*, 112 F.3d at 933.

8. Badhwar v. United States Dep't of the Air Force, 622 F. Supp. 1364, 1367 (D.C. Cir. 1985).

9. 5 U.S.C.A. § 552(b)(5) (West 1996).

10. U.S. Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 164 (E.D.N.Y. 1994).

11. Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979).

of the National Environmental Policy Act (NEPA) to transboundary effects.[12] The guidance will impact installations near the Mexico and Canadian borders and should be followed when such installations examine a proposed federal action in a NEPA analysis.

The CEQ guidance requires a federal agency to conduct an analysis of reasonably foreseeable transboundary effects of a proposed action which occurs in the United States.[13] It applies only to actions which are currently covered by the NEPA and which occur within the United States or its territories. The guidance is not intended to expand the range of actions to which the NEPA applies.

Under the CEQ guidance, the NEPA analysis must include consideration of the reasonably foreseeable effects of a proposed federal action across international boundaries.[14] Possible examples include an action that may result in increased water usage that would affect an aquifer shared by another country or the siting of a hazardous air pollutant source on the installation that could impact individuals in the foreign country.

The CEQ recommends using the scoping process to identify actions that could have transboundary effects.[15] The guidance recommends that analysts pay particular attention to actions that could affect migratory species, air quality, watersheds, and other ecosystem components that cross borders.[16] Analysts should also consider interrelated social and economic effects, although social and economic effects alone will not be enough to trigger an Environmental Impact Statement analysis.

The agency has the discretion to determine how much information is needed to satisfy the new guidance. The CEQ notes that agencies must "undertake a reasonable search for relevant, current information associated with an identified potential effect,"[17] and are not required to address remote or highly speculative consequences. Major Polchek.

Migratory Bird Treaty Act—Litigation Update

Courts continue to wrestle with the applicability of the Migratory Bird Treaty Act (MBTA) to federal agencies.[18] Some public advocacy groups allege that the MBTA's prohibitions apply to federal agencies, but two circuit courts recently ruled that the MBTA does not apply to the actions of federal agencies.[19] To avoid potential MBTA litigation, practitioners should coordinate with the U.S. Fish and Wildlife Service for all actions that may adversely affect migratory birds. Major Ayres.

Sikes Act Reauthorization Efforts

Despite two consecutive years of unsuccessful efforts, it appears that Congress will pass a revised, updated, and strengthened Sikes Act.[20] Currently, the Sikes Act authorizes the Department of Defense (DOD) to enter into cooperative plans with the Department of Interior and state fish and game agencies to manage fish and wildlife on military installations. Two bills under consideration in Congress would alter the permissive nature of the Sikes Act and would create a statutory requirement for military installations to prepare integrated natural resources management plans (INRMPs).[21] In anticipation of the reauthorization of the Sikes Act, and pursuant to DOD instruction,[22] the Department of the Army recently issued guidance on preparing INRMPs.[23]

Both of the Sikes Act reauthorization bills currently being considered by Congress also detail mandatory contents of the

---

12. Memorandum from Kathleen McGinty, Chair, Council on Environmental Qaulity, to heads of federal agencies (July 1, 1997) (on file with author). Practitioners can obtain the CEQ guidance from the Environmental Law forum of the LAAWS BBS.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. The Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1994).

19. Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997); Newton County Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997).

20. The Sikes Act, 16 U.S.C. § 670a-f (1997). Congress initially enacted the Sikes Act in 1960 and has amended the act five times; the most recent amendments were added in 1986.

21. *See* H.R. Res. 374, 105th Cong. (1997); H.R. Res. 1119, 105th Cong. (1997).

22. U.S. DEP'T OF DEFENSE, INSTR. 4715.3, ENVIRONMENTAL CONSERVATION PROGRAM (3 May 1996).

23. *See Integrated Natural Resources Management Plan (INRMP) Guidance Released,* ARMY LAW., June 1997, at 57.

INRMPs. The contents required by each bill, however, differ slightly. It is likely that a compromise version of the two bills will be incorporated into the National Defense Authorization Act for Fiscal Year 1998.[24] Major Ayres.

Air Force Environmental Law Courses

The Air Force will sponsor three environmental law courses at Maxwell Air Force Base, Montgomery, Alabama. The courses scheduled are: the Advanced Course, 1-3 December 1997; the Update Course, 23-25 February 1998; and the Basic Course, 4-8 May 1998. The courses are free, but travel and TDY are the attendee's responsibility. The Advanced Course has a very limited number of seats, and the MACOM ELS must nominate a person before that person can attend the course. For the Update and Basic courses, Army attorneys can enroll by contacting Ms. Mary Nixon at the Environmental Law Division, FAX: (703) 696-2940; Voice: (703) 696-1230; or e-mail: nixonmar@otjag.army.mil. Mr. Nixon.

Litigation Division Notes

Recent Military Personnel Law Decisions

The case of *Burkins v. United States*

Introduction

On 22 April 1997, the United States Court of Appeals for the Tenth Circuit decided a case which recognized the exclusive jurisdiction of the United States Court of Federal Claims over cases in which a plaintiff's prime objective is the recovery of more than $10,000 in monetary damages, even when the plaintiff frames his complaint as a request for injunctive, declaratory, or mandatory relief. In *Burkins v. United States*,[25] the Tenth Circuit applied the "prime objective" or "essential purpose" test and determined that, although the plaintiff did not explicitly seek monetary relief, his prime objective was to recover more than $10,000 in disability benefits and/or retired pay from the federal government; thus, the exclusive jurisdiction of the Court of Federal Claims was triggered. The Tenth Circuit concluded that the district court lacked jurisdiction and ordered that the case be transferred to the Court of Federal Claims.

Background

The plaintiff, a Vietnam veteran and former enlisted soldier in the Hawaii National Guard, sought correction of his military records from the Army Board for Correction of Military Records (ABCMR)[26] to reflect that he received a disability discharge instead of an honorable discharge when he left active duty on 4 November 1970. The plaintiff argued that he was entitled to a retroactive disability discharge because he had suffered from Post-Traumatic Stress Disorder (PTSD) as a result of his active duty service in Vietnam. The ABCMR granted partial relief to the plaintiff in the form of a determination that he was entitled to a fifty-percent disability rating retroactive to 18 March 1987.

The plaintiff filed suit in federal district court in Colorado, alleging that the decision of the ABCMR was arbitrary, capricious, and contrary to law, and seeking a writ of mandamus ordering the ABCMR to correct his military records retroactive to 4 November 1970. The district court subsequently remanded the case to the ABCMR to consider newly-discovered evidence, but, after consideration, the ABCMR denied the plaintiff any further relief. The district court ultimately concluded that the decision of the ABCMR was arbitrary and capricious, and the court ordered the ABCMR to correct the plaintiff's military records to reflect that he suffered from 100% disabling PTSD retroactive to 4 November 1970.[27] The ABCMR complied with the district court's order. The United States appealed and asserted, inter alia, that the district court lacked jurisdiction.

Jurisdiction

Jurisdiction over monetary claims against the United States is exclusively defined by the Tucker Act,[28] the provisions of which confer original concurrent jurisdiction on district courts and the Court of Federal Claims for non-tort civil actions or claims against the United States *not* exceeding $10,000 which are based upon the Constitution, statutes, regulations, or contracts. The Court of Federal Claims has exclusive jurisdiction over such claims which exceed $10,000.[29] In the exercise of its jurisdiction, the Court of Federal Claims has the authority to grant complete and appropriate relief for claims not otherwise barred; the Court may issue "orders directing restoration to office or position, placement in appropriate duty or retirement

24. Interview with Anne Mittemeyer, General Counsel to the Senate Armed Services Committee, in Wash., D.C. (July 1, 1997).

25. 112 F.3d 444 (10th Cir. 1997).

26. The ABCMR is authorized to correct military records in the event that such a change is "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a) (1994).

27. Burkins v. United States, 914 F.Supp. 408, 415 (D. Colo. 1996).

28. 28 U.S.C. §§ 1346, 1491 (1994).

29. *Id.* § 1491.

status, and correction of applicable records" in order to provide an entire remedy.[30]

In *Burkins*, the Court of Appeals noted that under Tenth Circuit law, a plaintiff cannot avoid the exclusive jurisdiction of the Court of Federal Claims by "framing a complaint in the district court as one seeking injunctive, declaratory, or mandatory relief when, in reality, the thrust of the suit is one seeking money damages from the United States."[31] The court then reiterated its adoption of the "prime objective" or "essential purpose" test, under which the exclusive jurisdiction of the Court of Federal Claims is triggered if the plaintiff's prime objective or essential purpose is to recover money in excess of $10,000 from the federal government.[32] Applying the test to Burkins, the court held that it was clear that his prime objective was to obtain benefits in excess of $10,000 in the form of retirement pay from the Army, disability pay from the Department of Veterans Affairs, or both, despite the fact that he had not framed his complaint as a request for monetary relief.[33] The Court noted that the plaintiff failed to articulate how the correction of his military records represented any significant prospective effect or considerable value beyond entitling him to retroactive monetary benefits.[34] The Tenth Circuit concluded that Burkins was required to pursue his military records correction claim in the Court of Federal Claims, pursuant to that court's exclusive Tucker Act jurisdiction, and vacated the judgment of the district court.[35]

Conclusion

The Tenth Circuit's decision in *Burkins* serves as a reminder that jurisdiction is an issue that must be raised by the government at every level. Despite the lengthy and tortured procedural history of the *Burkins* case and an adjudication on the merits in plaintiff's favor by the district court, the Court of Appeals properly applied the law when it determined that the Court of Federal Claims was the only Court with jurisdiction to hear the plaintiff's case. Captain Tetreault.

The case of *Norris v. Dep't of Defense*

Introduction

On 29 October 1996, the United States District Court for the District of Columbia rejected a plaintiff's claim for treble damages against the United States and certain named government officials under the Racketeer Influenced and Corrupt Organizations Act (RICO).[36] In *Norris v. Department of Defense*,[37] the D.C. district court granted the defendants' motion to dismiss on sovereign immunity grounds as against the United States and the named officials in their official capacities, and for failure to articulate sufficient facts to support the plaintiff's claims as against the named officials in their individual capacities.[38]

Background

Proceeding pro se, the plaintiff, a medical doctor and former colonel in the United States Army, filed a 153-page complaint against, inter alia, the Department of Defense, the Secretary of Defense, the Surgeon General, and the Executive Secretary of the Army Board for Correction of Military Records (ABCMR), alleging RICO violations. The plaintiff served on active duty with the Army Medical Department (AMEDD) from 1981 to 1988 and held the ranks of major, lieutenant colonel, and colonel. The plaintiff's specialty was nuclear medicine.

Beginning in 1986, the plaintiff's difficulties in following military regulations and relating to other staff members, particularly subordinates, were documented in assessments of her performance. In 1987, the plaintiff's clinical privileges were suspended pending an investigation into allegations that the plaintiff had allowed her temporary secretary-receptionist to administer radionuclides into a patient at the Nuclear Medicine Clinic. Though her clinical privileges were later restored, the plaintiff continued to have performance problems. She ignored her chain of command, harassed her subordinates, and demonstrated complete disregard for military authority. In 1988, the plaintiff was suspended from all duties in the Nuclear Medicine Clinic after she directed a housekeeper to clean the "hot lab" at the clinic, in violation of federal law, licensing guidelines, and

30. *Id.* § 1491(a)(2).

31. Burkins v. United States, 112 F.3d 444, 449 (10th Cir. 1997) (citations omitted).

32. *Id.*

33. *Id.*

34. *Id.* at 449-50.

35. *Id.* at 450-51.

36. 18 U.S.C. §§ 1961-68 (1994).

37. No. 95-2392 (D.D.C. Oct. 29, 1996) (Memorandum Opinion and Order).

38. *Id.* slip op. at 3-4.

Army regulations. The plaintiff was honorably discharged from the Army on 14 July 1988, at the expiration of her term of service.

From 1987 to 1995, the plaintiff submitted twenty-nine requests and letters to the ABCMR concerning the correction of her personnel records. The ABCMR denied all but one of the plaintiff's requests for relief and correction of her military records. In December 1995, the plaintiff filed suit against the defendants in the D.C. district court. She based her RICO claims on alleged acts of mail fraud, wire fraud, bribery, obstruction of justice, and violation of military regulations.[39] The gravamen of the plaintiff's complaint was that the defendants fired her, defamed her, and falsified her military personnel records for the purpose of perpetuating a fraudulent scheme by which the defendants created an artificial shortage of Army doctors in order to persuade Congress to approve higher salaries and larger bonuses for the remaining doctors.[40] The plaintiff asserted that the "enterprise" at issue for RICO purposes was the AMEDD.[41]

Sovereign Immunity

The United States, its agencies, and its officers acting in their official capacities are immune from suit absent a waiver of sovereign immunity.[42] In order to maintain her action against agencies and officers of the United States, the plaintiff was required to establish that the United States had waived its sovereign immunity. The district court found that the plaintiff had failed to establish such a waiver, stating: "The RICO statute contains no express waiver of sovereign immunity, and every court that has considered the issue has recognized that the United States has not waived its sovereign immunity for claims brought under RICO."[43] Accordingly, the district court dismissed the complaint as against the United States, the Department of Defense, the AMEDD, the ABCMR, all other federal governmental entities named by the plaintiff, and all individual defendants in their official capacities.[44] With respect to the individual defendants sued in their personal capacities as well as their official capacities (the Secretary of Defense, the Surgeon General, and the Executive Secretary of the ABCMR), the district court held that the plaintiff failed to allege sufficient facts to support her RICO claims against these defendants individually.[45] Accordingly, the district court granted the defendants' motion to dismiss.

Conclusion

The plaintiff appealed the district court's dismissal of her case. On 5 May 1997, the United States Court of Appeals for the District of Columbia Circuit granted the government's motion for summary affirmance, finding that the merits of the parties' positions were so clear as to warrant summary action.[46] The circuit court's decision reaffirms that RICO claims against the federal government, its agencies, and its officers acting in their official capacities are barred by the doctrine of sovereign immunity. Captain Tetreault.

---

39. *Id.* at 4.

40. *Id.*

41. *Id.* at 5, n.3.

42. *See generally* Hawaii v. Gordon, 373 U.S. 57, 58 (1963); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687 (1949).

43. *Norris*, slip op. at 3 (citations omitted).

44. *Id.* at 3-4.

45. *Id.* at 4.

46. Norris v. Department of Defense, No. 96-5326, 1997 WL 362495 (D.C. Cir. May 5, 1997) (Order and Per Curiam Memorandum).